No. 92-267

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UJB FINANCIAL CORP., *et al.*,

Petitioners,

v.

IRWIN SHAPIRO, ROBERT BASSMAN, JEROME KATZ, NORMAN SALSITZ, JEAN LEE, and CHAPPAQUA FAMILY TRUST,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The New York Clearing House Association (the "Clearing House") is an association of eleven commercial banks in the City of New York. The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, European American Bank and Republic National Bank of New York. The banks of the Clearing House include some of the largest consumer and commercial banks in this country. The Clearing House

regularly appears as *amicus curiae* in cases raising important issues relating to the banking industry.

The Clearing House has requested the consent of all parties to this action for the filing of its brief as *amicus curiae*. Counsel for Petitioners has consented to the filing of the attached brief. Counsel for Respondents has withheld consent.

The complaint in this action resembles those filed in a multitude of other actions against banks and bank holding companies in the past several years. The underlying theory here—as in those cases—is that the defendants violated Rule 10b-5 by establishing inadequate loan loss reserves, thereby overstating assets and artificially inflating the price of the bank's stock. The complaint notes that loan loss reserves were once described as adequate and were later increased, and then simply concludes that the difference between the earlier statements and the later increase in reserves must be attributable to fraud. Courts confronting such complaints have dismissed them on the ground that they allege nothing more than "fraud by hindsight."

The Clearing House is concerned that the decision below, which permits boilerplate allegations that plaintiffs have tried and failed to obtain facts supporting their accusations of fraud to substitute for pleading fraud with particularity, will enable plaintiffs to pursue baseless claims against banks under the federal securities laws. If allowed to stand, the decision below will lead to a flood of lawsuits in the federal courts and impose enormous burdens on United States banks by forcing them to devote substantial resources to defend against frivolous claims.

The Clearing House seeks to submit this brief as *amicus curiae* in support of the Petition to stress the importance of

the issues to United States banks and to show the deleterious effects of the decision below on the nation's banking system.

Respectfully submitted,

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AmeriFirst Bank v. *Bomar*,
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Boyle v. *Merrimack Bancorp, Inc.*,
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In re Chase Manhattan Corp. Sec. Litig.,
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Cole v. *Federal Home Loan Mortgage Corp.*, 1991
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Cooperman v. *One Bancorp*,
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Cosmas v. *Hassett*,
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CTS Corp. v. *Dynamics Corp.*,
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Feigenbaum v. *Bankeast Corp.*,
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First Am. Bank & Trust v. *Frogel*,
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In re First Constitution Shareholders Litig.,
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In re First Fidelity Bancorporation Sec. Litig., [1990] Fed. Sec. L. Rep.
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Gollomp v. *MNC Fin., Inc.*,
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Haft v. *Eastland Fin. Corp.*,
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Hall v. *Southeast Banking Corp.*,
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Hershey v. *MNC Fin., Inc.*,
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In re Midlantic Corp. Shareholder Litig.,
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Naye v. Boyd, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,979 (W.D. Wash.), *aff'd*, 804 F.2d 146 (9th Cir. 1986) 18

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Rembold v. *Pacific First Fed. Sav. Bank.*, 1988 U.S. Dist. LEXIS 6297 (D. Ore. June 17, 1988) 18

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Salit v. *Centerbank*, 767 F. Supp. 429 (D. Conn. 1990) 17

Santa Fe Indus., Inc. v. *Green.*, 430 U.S. 462 (1977) 11

Save On Surplus Pension Plan v. *United Saver's Bancorp, Inc.*, 760 F. Supp. 971 (D.N.H. 1990) 17

Semegen v. *Weidner*, 780 F.2d 727 (9th Cir. 1985) 8

Shapiro v. *UJB Fin. Corp.*, 964 F.2d 272 (3d Cir. 1992) . . . . . *passim*

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Sinay v. *Lamson & Sessions Co.*,
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Steiner v. *Shawmut Nat'l Corp.*,
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Urbach v. *Sayles*,
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Unocal Corp. v. *Mesa Petroleum Co.*,
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Vachon v. *BayBanks, Inc.*,
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Virginia Bankshares, Inc. v. *Sandberg*,
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Zucker v. *MNC Fin., Inc.*,
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Fed. R. Civ. P. 9(b) . . . . . *passim*

Rule 10b-5, 12 C.F.R. § 240.10b-5 . . . . . *passim*

Other Authorities

American Bankers Association, *Banking Terminology* (1981) 9

Hector R. Anton, *Managing the Allowance for Loan and Lease Losses* (1988) 10

Francis X. Conway & William A. Siegenthaler, *Loan Loss Reserves: Tax, Regulatory and Adequacy Issues*, 70 J. Comm. Bank Lending 1 (Sept. 8, 1987) 9

Financial Accounting Standards Board, *Accounting Standards Current Text—General Standards, Contingencies*, § C59.105 (1991) 10

OCC Banking Circular No. 201 (Feb. 20, 1992), *reprinted in* [Current] Fed. Banking L. Rep. (CCH) ¶ 51,132 9

Office of the Comptroller of the Currency, *Comptroller's Handbook for National Bank Examiners* § 217.1 (1984) 9

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SEC Fin. Reporting Release No. 28, *Accounting For Loan Losses by Registrants Engaged in Lending Activites* (Dec. 1, 1986), *reprinted in* 6 Fed. Sec. L. Rep. (CCH) ¶ 73,126D. 9-10

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BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The New York Clearing House Association (the "Clearing House") is an association of eleven leading commercial banks in the City of New York.[1] The member banks of the

[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, European American Bank, and Republic National Bank of New York.

Clearing House are major sources of commercial and consumer credit in the United States, with more than $346 billion in domestic loans outstanding as of December 31, 1991. The Clearing House regularly appears as *amicus curiae* in cases raising important issues relating to banking, and its members have a common and fundamental interest in the recognition and consistent application of clear and certain rules of law to the banking industry.

The Clearing House is concerned that the standard articulated by the Third Circuit in this case will enable plaintiffs to pursue claims of fraud under the federal securities laws based on nothing more than a decline in the value of their investments in banks whose profitability is adversely affected by periodic economic downturns. Claims that a bank's disclosures *must have been* fraudulent merely because management failed to predict the future have long been rejected as insufficiently particularized and inactionable. The Third Circuit, however, would permit such claims to stand so long as they include a boilerplate recitation of plaintiffs' unsuccessful efforts to obtain any factual information that might substantiate their cries of fraud. Such a rule of law—which directly conflicts with the rules established in several other Circuits—will encourage strike suits and thereby burden the federal courts, damage defendant banks' reputations and goodwill, force banks to expend substantial resources to defend against frivolous claims, and impose additional costs and uncertainty on the United States banking system.

SUMMARY OF ARGUMENT

The opinion below addresses an extremely important issue that arises at the intersection of Fed. R. Civ. P. 9(b) ("Rule 9(b)") and Rule 10b-5 under the Securities Exchange Act of 1934 ("Rule 10b-5"): should plaintiffs bringing Rule 10b-5

claims be permitted to plead fraud--including the critical element of scienter—in wholly conclusory terms so long as they allege the nature and scope of their unsuccessful efforts to obtain specific information to support their claims? The Third Circuit's affirmative answer to this question represents an extraordinary departure from the law of other Circuits, under which a Rule 10b-5 claim will be dismissed unless it contains sufficient details concerning the "who, what, when, where, and how" of the alleged fraud.

The pleading standard announced below effectively nullifies Rule 9(b) by relieving plaintiffs of their obligation to plead fraud under the federal securities laws with particularity. Having alleged that a bank deemed its loan loss reserves adequate and its lending policies and procedures prudent, a plaintiff need only (i) plead that the bank later increased its reserves, and (ii) express a belief—lacking factual support—that any difference between the bank's disclosures and the subsequent course of events is attributable to management's fraud. The use of this kind of *res ipsa loquitur* analysis to test the sufficiency of a pleading subverts the purposes of Rule 9(b) and encourages costly and wasteful fishing expeditions to uncover support for conclusory allegations designed to coerce settlements that management agrees to only to avoid the expense and demands of litigation. The interpretation of Rule 9(b) in this case is especially inappropriate because the establishment of adequate loan loss reserves is necessarily a subjective and imprecise task best left to management's business judgment.

By effectively eliminating the requirements of Rule 9(b) in the context of securities fraud claims against banks, moreover, the decision below paves the way for a radical expansion of Rule 10b-5 into territory more appropriately left to regulation by the States. Stripped of the element of scienter, the plaintiffs' complaint in this case, like the legions

of complaints brought under Rule 10b-5 against banks in recent years, at most states a claim of mismanagement—a failure to exercise sufficient caution in making loans and to provide adequate reserves for possible losses. "Mismanagement by hindsight" is not fraud; before this case, the only recourse available to a plaintiff unable to allege facts supporting an inference that a bank's management deliberately misled investors was to bring a claim under state law.

By emasculating Rule 9(b) and allowing mismanagement claims to masquerade as securities fraud, the Third Circuit has violated fundamental principles of federalism, substantially broadened the scope of Rule 10b-5, and virtually guaranteed a flood of new lawsuits in the federal courts. Those lawsuits increase the expense and uncertainty that a prolonged recession has imposed on the United States banking system. The expense incurred in defending against frivolous fraud claims adds to the cost of credit and ultimately reduces the competitiveness of domestic banking institutions in world financial markets. This Court should grant plenary review to correct the drastic and untoward departure of the decision below from settled law.

ARGUMENT

I.

THE THIRD CIRCUIT'S INTERPRETATION OF RULE 9(b) IN THIS CASE CONFLICTS WITH OTHER CIRCUIT COURT DECISIONS THAT ESTABLISH A FAR MORE JUDICIOUS TEST OF THE SUFFICIENCY OF PLEADINGS ALLEGING THAT A BANK VIOLATED RULE 10b-5 BY INCORRECTLY ASSESSING THE ADEQUACY OF ITS LOAN LOSS RESERVES.

Plaintiffs commenced this litigation soon after UJB Financial Corp. ("UJB") announced that it would add to its loan loss reserves as a result of a substantial increase in nonperforming loans that followed on the heels of a sharp regional economic reversal. In their complaint, plaintiffs claim that UJB and its management violated Rule 10b-5 by deliberately or recklessly understating UJB's allowance for loan losses, thereby overstating income and assets, and characterizing UJB's loan loss reserves as "adequate" and its lending practices as "prudent" and "conservative." This claim is a mirror image of a multitude of "cookie-cutter" Rule 10b-5 complaints brought against banks over the past several years. (*See* the Addendum to this brief).

Despite the conclusory assertion that defendants intentionally misled the investing public by inaccurately describing UJB's loan loss reserve and lending practices in public documents, plaintiffs' complaint is devoid of any specific *factual* allegations indicating that at the time those statements were made, defendants deliberately lied about or recklessly disregarded the purported inadequacy of those lending practices or loan loss reserves. Nor do plaintiffs allege any facts about deficiencies relating to specific loans or lending procedures. Instead, plaintiffs merely quote UJB's

statements that its loan loss reserve was adequate and its lending practices prudent, note that UJB later increased its loan loss reserve, and conclude that the statements about which plaintiffs complain must therefore have been fraudulent.

Given plaintiffs' conclusory allegations and fundamentally fallacious syllogism, their complaint was an obvious candidate for dismissal under Rule 9(b), which provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The Third Circuit, however, ruled that the "relaxed" Rule 9(b) standard, which is sometimes applied where a plaintiff contends that the facts needed to allege fraud with the requisite particularity lie exclusively within a defendant's control, could be relaxed still further so that a complaint containing absolutely no factual allegations supporting an inference of fraud could nevertheless survive a motion to dismiss provided that it "delineate[s] at least the nature and scope of plaintiffs' effort to obtain, before filing the complaint, the information needed to plead with particularity." (Petitioners' Appendix I, A24).

The court below thus held that the inclusion of a boilerplate description of unsuccessful efforts to obtain facts upon which to base a claim of fraud immunizes a Rule 10b-5 complaint alleging "fraud by hindsight" that otherwise fails to satisfy the strictures of Rule 9(b). This rule of law conflicts irreconcilably with the interpretation of Rule 9(b) and Rule 10b-5 articulated by a number of other Circuits, under which claims of fraud by hindsight—which by definition fail to specify the "who, what, when, where, and how" of allegedly materially misleading statements or omissions—are deemed inactionable and insufficiently

particularized.[2] *See*, *e.g.*, *Denny* v. *Barber*, 576 F.2d 465, 470 (2d Cir. 1978); *Romani* v. *Shearson Lehman Hutton*, 929 F.2d 875, 878-80 (1st Cir. 1991); *DiLeo* v. *Ernst & Young*, 901 F.2d 624, 627-28 (7th Cir.), *cert. denied*, 111 S. Ct. 347 (1990); *Sinay* v. *Lamson & Sessions Co.*, 948 F.2d 1037 (6th Cir. 1991); *Ciresi* v. *Citicorp*, 782 F. Supp. 819, 822 (S.D.N.Y. 1991), *aff'd without opinion*, 956 F.2d 1161 (2d Cir. 1992).[3] Indeed, as explained more fully in Point I(B) of UJB's Petition, the decision below even conflicts with the Third Circuit's own decisions in *Decker* v. *Landmark Sav. Ass'n*, No. 91-3776 (3d Cir. May 20, 1992), which was decided on the same day as *Shapiro*, and *Christidis* v. *First Pa. Mortgage Trust*, 717 F.2d 96 (3d Cir. 1983).

The reasoning of the cases that conflict with the decision below is compelling. As the Seventh Circuit put it in *DiLeo*, 901 F.2d at 627,

> [t]he story in this complaint is familiar in securities litigation. At one time the firm bathes itself in a favorable light. Later the firm discloses that things are less rosy. The plaintiff contends that the difference must be attributable to fraud. "Must be" is the critical phrase, for the complaint offers no information

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[2] Claims of fraud by hindsight under Rule 10b-5 are subject to dismissal for failure to state a claim as well as for failure to allege fraud with particularity. No matter which procedural approach is taken, the underlying analysis is essentially the same: allegations that disclosures eventually turned out to be incorrect, when unaccompanied by any factual details indicating that the disclosures were intentionally or recklessly misleading when made, are deficient because they do not plead fraud, much less plead it with particularity.

[3] As noted in UJB's Petition at page 11 n.4, many district court decisions have followed the reasoning of these cases.

> other than the differences between the two statements of the firm's condition. Because only a fraction of financial deteriorations reflects fraud, plaintiffs may not proffer the different financial statements and rest. Investors must point to some facts suggesting that the difference is attributable to fraud.

See also Denny, 576 F.2d at 470 (declining to subject defendant bank to potential liability under Rule 10b-5 merely because its management did not exercise "greater clairvoyance"); *Romani*, 929 F.2d at 880 (noting that if claims of fraud by hindsight were "deemed sufficient, the advent of a recession could be expected to trigger a multitude of complaints in which plaintiffs seek to impose liability for their financial disappointments based on entirely fabricated scenarios of fraud").

The use of Rule 9(b) to condemn claims of fraud by hindsight fulfills the purposes Rule 9(b) was designed to serve, including (i) protecting defendants from the damage to their reputations resulting from unsubstantiated claims of fraud, (ii) limiting the burden and expense associated with the defense and adjudication of such claims, (iii) curtailing the commencement of lawsuits as a device to engage in fishing expeditions, and (iv) precluding the filing of strike suits. *See*, *e.g.*, *Romani*, 929 F.2d at 878; *Cosmas* v. *Hassett*, 886 F.2d 8, 11 (2d Cir. 1989); *New England Data Servs., Inc.* v. *Becher*, 829 F.2d 286, 289 (1st Cir. 1987); *Semegen* v. *Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). The risk of strike suits, and therefore the need for a strict interpretation of Rule 9(b), is enhanced in cases such as this that involve high stakes and potentially extensive and expensive discovery. *See*, *e.g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975) (recognizing that liberal discovery rules represent "a social cost rather than a benefit" insofar as they

permit plaintiffs "to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence.").

The firm application of Rule 9(b) is especially appropriate in the context of claims that a bank violated Rule 10b-5 by incorrectly assessing the adequacy of its loan loss reserve. A loan loss reserve is an "account established based on a bank's loss experience to compensate for expected losses from the loans extended." American Bankers Association, *Banking Terminology* 154 (1981). Banks set their reserves, which are funded through quarterly changes against earnings, by estimating the total potential loss of principal inherent in their particular loan portfolios. *See generally* Francis X. Conway & William A. Siegenthaler, *Loan Loss Reserves: Tax, Regulatory and Adequacy Issues*, 70 J. of Comm. Bank Lending 1, 9-14 (Sept. 1987).

Determining the appropriate level of a loan loss reserve is more an art than a science, requiring an inherently subjective exercise of managerial judgment based on consideration of a broad range of factors. *See* OCC Banking Circular No. 201 (Feb. 20, 1992), *reprinted in* [Current] Fed. Banking L. Rep. (CCH) ¶ 51,132, at 30,133-6; Office of the Comptroller of the Currency, *Comptroller's Handbook for National Bank Examiners* § 217.1, at 2-3 (1984) (providing non-exhaustive list of factors taken into account in establishing loan loss reserves). As the SEC has stated, "[a]rriving at an appropriate reported allowance for loan losses necessarily involves a high degree of management judgment." SEC Financial Reporting Release No. 28, *Accounting for Loan Losses by Registrants Engaged in Lending Activities* (Dec. 1, 1986), *reprinted in* 6 Fed. Sec. L. Rep. (CCH) ¶ 73,126D, at 62,760. Indeed, one commentator

has noted that "at best, the estimation of future loan and lease losses inherent in a present loan portfolio held by a bank is largely judgmental; at worst it is completely arbitrary. . . . It is a judgment call and, thus, subjective . . . ." Hector R. Anton, *Managing the Allowance for Loan and Lease Losses* 11, 15 (1988).

A loan loss reserve, moreover, represents an estimate of losses made at a specific time. Subsequent significant changes in the economic environment, whether for better or worse, will almost always require a reevaluation of that estimate. As recent events have demonstrated, a sharp regional economic downturn will lead to increases in loan loss reserves, and corresponding decreases in earnings and stock prices, at virtually every bank in the region. Changes in the size of a bank's loan loss reserve do not mean that a bank's original assessment was incorrect, much less fraudulent, when made.[4]

Because determinations of the appropriate level of loan loss reserves are by nature subjective and imprecise, there simply is no way to guarantee that a bank's reserves will ultimately cover actual losses. Accordingly, courts must view with caution claims that the difference between the reserve that a bank deems adequate at a given time and the reserve the bank finds appropriate at a later time demonstrates that the bank's management perpetrated a fraud on the investing public. Only by requiring plaintiffs to plead with particularity that a defendant bank and its management intended to and did

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[4] Indeed, given that FASB Statement No. 5 of Financial Accounting Standards limits loan loss reserves to losses that are both probable and reasonably estimable, banks cannot maintain large reserves merely because a future recession might lead to an increase in the volume of nonperforming loans. *See* Financial Accounting Standards Board, *Accounting Standards, Current Text—General Standards, Contingencies* § C59.105 (1991).

defraud investors will there be some assurance that a bank's establishment of loan loss reserves and other lending practices are properly the subject of an action under the anti-fraud provisions of the federal securities laws.[5]

II.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OPENS THE DOOR TO THE FEDERALIZATION OF AREAS OF CORPORATE LAW THAT HAVE TRADITIONALLY BEEN THE PROVINCE OF THE STATES.

In *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 474-80 (1977), this Court definitively ruled that allegations of corporate mismanagement do not state a claim under Rule 10b-5. As the Court pointed out, to extend the federal securities laws to claims of corporate mismanagement would not only pose a "danger of vexatious litigation which could result from a widely expanded class of plaintiffs," but would also "quite possibly interfere with state corporate law," which establishes the framework of carefully crafted fiduciary duties that both protects investors and enables management to exercise its business judgment. *Id.* at 479 (quotation omitted). Moreover, the federalization of mismanagement claims "would discourage firms from taking risk," which in turn

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[5] Plaintiffs can satisfy the requirements of Rule 9(b) in these sorts of cases: motions to dismiss Rule 10b-5 claims against banks have been denied where the complaints describe deficiencies relating to specific loans and lending procedures, or allege material misstatements of fact not related to loan loss reserves, and set forth circumstances from which scienter may be inferred. *See Nicholas* v. *Poughkeepsie Sav. Bank/FSB*, [Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,606, at 97,840-41 (S.D.N.Y. 1990); *Hurley* v. *FDIC*, 719 F. Supp. 27, 29-31 (D. Mass. 1989).

would "make investors as a whole worse off." *DiLeo*, 901 F.2d at 627. In the case of banks, such an approach would also discourage the extension of credit.

By "relaxing" the standard of Rule 9(b) to an unprecedented extent, the decision below conflicts with *Santa Fe* by drastically enlarging the scope of permissible claims under Rule 10b-5. Plaintiffs allege no facts suggesting that when UJB's management described its loan loss reserves as adequate and its lending practices as prudent, it believed that those descriptions were inaccurate. Nor do plaintiffs plead facts indicating that UJB's management departed from any appropriate standard for setting loan loss reserves, much less that it recklessly disregarded information that would have led it to increase UJB's reserve at any time before that reserve was actually increased. Thus, when stripped of purely conclusory allegations of fraud and reduced to its essence, plaintiffs' claim is at most a claim that UJB mismanaged its commercial loan portfolio and loan loss reserves.[6] Although the court below pays lip service to the rule of *Santa Fe*

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[6] The reliance in the decision below upon *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749 (1991), was misplaced. (*See* A18-20). In *Virginia Bankshares*, a jury found that defendants' description of a tender offer price as "high" and the terms of a merger as "fair" was false and misleading. The Court held that defendants' statements were actionable under Rule 14a-9 because although they were expressions of belief, they were not only material but were also types of beliefs that could be readily supported or contradicted by facts, as they were during the trial of the case. *Id.* at 2758-59. *Virginia Bankshares* did not interpret or apply Rule 9(b) or address the sufficiency of any pleading. Nor can it be read to support the view that a complaint alleging that statements of belief were false when made could withstand scrutiny under Rule 9(b) where, as here, the challenged statements of belief are by nature highly subjective rather than objectively verifiable, and the complaint pleads no facts demonstrating or even suggesting that the statements were false.

(A20-21), it violates the letter and spirit of that decision by interpreting Rule 9(b) to allow plaintiffs to proceed with such a claim under Rule 10b-5.

The determination of the appropriate level of a bank's loan loss reserve is a prototypical example of the exercise of management's business judgment. Management must use its expertise and exercise discretion in such areas free of the fear that its decisions will be subject to second-guessing by disappointed investors and the courts. To protect good faith decisionmaking by management, the States have formulated the business judgment rule, which requires that a claim of mismanagement must be supported by facts demonstrating that managers had a conflict of interest or violated a duty of care owed to the corporation.[7] Federal courts have long recognized that the regulation of such matters of corporate governance is the province of the States. *See, e.g., Kamen* v. *Kemper Fin. Servs., Inc.*, 111 S. Ct. 1711, 1717, 1720-21 (1991); *CTS Corp.* v. *Dynamics Corp.*, 481 U.S. 69, 89 (1987).

The decision below permits claims of fraud under federal law based on allegations that fail to meet the traditional pleading standards for a claim of mismanagement under state law. Nothing in Rule 9(b) or Rule 10b-5 justifies this intrusion on traditional state regulation of domestic corporations, especially in circumstances where the challenged business decision is necessarily imprecise and subject to second-guessing with the benefit of 20-20 hindsight.

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[7] *See, e.g., Unocal Corp.* v. *Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985); *Auerbach* v. *Bennett*, 393 N.E.2d 994, 1000 (N.Y. 1979).

CONCLUSION

Lawsuits raising substantially similar claims concerning purported misrepresentations of the adequacy of banks' loan loss reserves have deluged the federal courts and the banking industry over the last several years. The sheer number of these cases and the similarity of their allegations, along with the speed with which they were brought, demonstrates that plaintiffs have not separated actual fraud from either the effects of a recession or occasions of mismanagement before bringing suit. Managers and directors of banks, already faced with daunting economic problems, should not have their honest business judgments challenged based on conclusory allegations of fraud. Plaintiffs must be required to allege specific facts substantiating accusations of fraud at the outset of litigation. The decision below would eliminate that requirement.

For the reasons stated herein and in the Petition, certiorari should be granted to review the judgment of the United States Court of Appeals for the Third Circuit and resolve the conflict with the rule of law established by other Circuits.

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ADDENDUM OF LOAN LOSS RESERVE CASES

Research has revealed 48 other cases involving claims that a bank violated Rule 10b-5 by mischaracterizing its loan loss reserves and lending practices, and there are surely many more that have not been the subject of reported decisions. The 48 cases are:

Decker v. *Landmark Sav. Ass'n*, No. 91-3776 (3d Cir. May 20, 1992)

DiLeo v. *Ernst & Young*, 901 F.2d 624 (7th Cir.), *cert. denied*, 111 S. Ct. 347 (1990)

Christidis v. *First Pa. Mortgage Trust*, 717 F.2d 96 (3d Cir. 1983)

Bogart v. *National Community Banks, Inc.*, 1992 WL 203788 (D.N.J. Apr. 25, 1992)

Harris v. *First Chicago Corp.*, 789 F. Supp. 919 (N.D. Ill. 1992)

Ferber v. *Travelers Corp.*, 785 F. Supp. 1101 (D. Conn. 1992)

In re Atlantic Fin. Fed. Sec. Litig., 1992 WL 50072 (E.D. Pa. Feb. 28, 1992)

Feinberg v. *Hibernia Corp.*, 1992 WL 54738 (E.D. La. Mar. 9, 1992)

Ciresi v. *Citicorp*, 782 F. Supp. 819 (S.D.N.Y. 1991), *aff'd*, 956 F.2d 1161 (2d Cir. 1992)

Fox v. *Equimark Corp.*, 782 F. Supp. 295 (W.D. Pa. 1991)

Vachon v. *Baybanks, Inc.*, 780 F. Supp. 79 (D. Mass. 1991)

Urbach v. *Sayles*, 779 F. Supp. 351 (D.N.J. 1991)

Hershey v. *MNC Fin., Inc.*, 774 F. Supp. 367 (D. Md. 1991)

In re Meridian Sec. Litig., 772 F. Supp. 223 (E.D. Pa. 1991)

Hershfang v. *Citicorp*, 767 F. Supp. 1251 (S.D.N.Y. 1991)

Wilkes v. *Heritage Bancorp, Inc.*, 767 F. Supp. 1166 (D. Mass. 1991)

Cagan v. *Anchor Sav. Bank FSB*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 95,324 (E.D.N.Y. 1990)

Salit v. *Centerbank*, 767 F. Supp. 429 (D. Conn. 1990)

Steiner v. *Shawmut Nat'l Corp.*, 766 F. Supp. 1236 (D. Conn. 1991)

Shields v. *Amoskeag Bank Shares, Inc.*, 766 F. Supp. 32 (D.N.H. 1991)

Dubowski v. *Dominion Bankshares Corp.*, 763 F. Supp. 169 (W.D. Va. 1991)

Save On Surplus Pension Plan v. *United Saver's Bancorp, Inc.*, 760 F. Supp. 971 (D.N.H. 1990)

In re Midlantic Corp. Shareholder Litig., 758 F. Supp. 226 (D.N.J. 1990)

Driscoll v. *Landmark Bank for Sav.*, 758 F. Supp. 48 (D. Mass. 1991)

Amerifirst Bank v. *Bomar*, 757 F. Supp. 1365 (S.D. Fla. 1991)

Gollomp v. *MNC Fin., Inc.*, 756 F. Supp. 228 (D. Md. 1991)

Boyle v. *Merrimack Bancorp, Inc.*, 756 F. Supp. 55 (D. Mass. 1991)

Cooperman v. *One Bancorp*, 135 F.R.D. 9 (D. Me. 1991)

Haft v. *Eastland Fin. Corp.*, 755 F. Supp. 1123 (D.R.I. 1991)

Mermelstein v. *Bank of New York*, No. 90 CV 3400 (EHN) (E.D.N.Y. June 14, 1991)

In re First Constitution Shareholders Litig., 1991 WL 218083 (D. Conn. Sept. 13, 1991)

Zimmerman v. *Shawmut Nat'l Corp.*, 1991 WL 274342 (D. Conn. Dec. 13, 1991)

Sonnenberg v. *Prospect Park Fin. Corp.*, 1991 WL 329755 (D.N.J. Aug. 20, 1991)

Cole v. *Federal Home Loan Mortgage Corp.*, 1991 WL 180295 (D.C.D.C. Aug. 27, 1991)

In re Chase Manhattan Corp. Sec. Litig., 1991 WL 152618 (S.D.N.Y. Aug. 1, 1991)

In re VMS Sec. Litig., 752 F. Supp. 1373 (N.D. Ill. 1990)

Ackerman v. *Bankworcester Corp.*, 751 F. Supp. 11 (D. Mass. 1990)

Krim v. *BancTexas Group, Inc.*, Civ. Action No. CA3-89-0369-D (N.D. Tex. Apr. 24, 1990)

Feigenbaum v. *Bankeast Corp.*, Civ. Action No. 90049L (D.N.J. 1990)

Balsam v. *Eastchester Fin. Corp.*, CV 90-2947 (E.D.N.Y. 1990)

Zucker v. *MNC Fin., Inc.*, Civ. Action No. 90-1319 (D. Md. 1990)

Hall v. *Southeast Banking Corp.*, Civ. Action No. 90-00838 (S.D. Fla. 1990)

First Am. Bank & Trust v. *Frogel*, 726 F. Supp. 1292 (S.D. Fla. 1989)

Zinberg v. *Washington Bancorp, Inc.*, 1989 WL 300323 (D.N.J. June 20, 1989)

In re First Fidelity Bancorporation Sec. Litig., [1990] Fed. Sec. L. Rep. (CCH) ¶ 95,299 (D.N.J. 1989)

Abrahamson v. *Western Sav. & Loan Ass'n*, 1989 WL 259997 (D. Ariz. July 7, 1989)

Rembold v. *Pacific First Fed. Sav. Bank*, 1988 U.S. Dist. LEXIS 6297 (D. Ore. June 17, 1988)

Naye v. *Boyd*, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,979 (W.D. Wash.), *aff'd*, 804 F.2d 146 (9th Cir. 1986)